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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

JACK A. FUSARI, COMMISSIONER OF LABOR, *et al.*,
Appellants,

v.

LARRY STEINBERG, *et al.*,
Appellees.

On Appeal From The United States District Court For The District Of Connecticut

MOTION BY ELLENMAE CROW, THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Ellenmae Crow, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the United Steelworkers of America, AFL-CIO, hereby respectfully move for leave to file a brief *amici curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. This motion is occasioned by the movents inability to secure the consent of both parties.

INTEREST OF THE AMICI CURIAE

Ellenmae Crow, the AFL-CIO, and the United Steelworkers are parties to the proceeding entitled *Crow, et al.* v. *California Department of Human Resources Development,*

No. 73-1015, presently pending on a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Very briefly stated the facts and the procedural history of *Crow* are as follows. Ellenmae Crow was found initially eligible for unemployment compensation benefits by the State of California. She received regular benefit payments for four months when California terminated her compensation for ten weeks for allegedly refusing an offer of employment. (Cal. Unemp. Ins. Code §§ 1257(b), 1260(b).)

The California procedure under which Mrs. Crow's benefits were terminated does not provide the recipient such pre-termination procedural safeguards as prior written notice, a meaningful opportunity to obtain representation and gather evidence, an opportunity to confront and cross-examine witnesses, or a decision by an impartial decision-maker based solely upon evidence adduced at a hearing. It provides only an opportunity to discuss the termination at a "pre-appeal interview." The first proceeding containing the aforementioned procedural safeguards is a "referee hearing,"[1] occurring several weeks or months after the termination of benefits.

Mrs. Crow protested the termination of her benefits and requested a referee hearing. Prior to her hearing before the referee, Mrs. Crow, facing a financial emergency due to the loss of her benefits, commenced a class action[2] con-

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[1] *See* Cal. Unemp. Ins. Code §§ 1951-1959, 22 Cal. Admin. Code §§ 5029-5030, 5038.

[2] Named as defendants were the California Department of Human Resources Development, the Department's Director, the Supervisor of the Department's Santa Cruz, California office, and the Secretary and the Regional Director of the United States Department of Labor. The District Court dismissed the latter three defendants

testing the legality of these summary termination proceedings. Subsequently the referee found that Mrs. Crow had not refused an offer of employment, and reversed the termination of her benefits.[3]

The District Court ruled that where an unemployment compensation recipient, who has properly been found initially eligible for benefits, contests an administrative determination that he or she is no longer eligible, the recipient is entitled to "a hearing consonant with the principles of Goldberg v. Kelly [397 U.S. 254]." (*Crow* v. *California Department of Human Resources Development*, 325 F.Supp. 1314 (N.D. Cal.).) A divided Court of Appeals reversed, (Battin, D. J., & Trask, C. J., formed the majority; Duniway, C. J., dissented). (*Crow* v. *California Department of Human Resources*, 490 F.2d 580 (C.A.9).)[4]

Thus, *Crow* and the instant case [5] are parallel proceedings

from the action, and granted the United States of America leave to intervene.

The suit, filed under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, challenged the denial of an evidentiary pre-termination hearing as violating the "when due" and "fair hearing" requirements of the Social Security Act, 42 U.S.C. §§ 503(a)(1) & (a)(3), and the due process clause of the Fourteenth Amendment.

[3] In lieu of granting a temporary restraining order restoring Mrs. Crow's benefits pending a hearing, the District Court accepted California's offer to expedite her hearing and decision.

[4] The proceedings in the Ninth Circuit were twice stayed, first pending the decision by this Court in *California Human Resources Dept.* v. *Java*, 402 U.S. 121, and subsequently pending this Court's decision in *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540. During those proceedings the Court of Appeals granted leave to the American Federation of Labor and Congress of Industrial Organizations and the United Steelworkers of America, AFL-CIO, to intervene.

[5] The facts and the procedural history of the instant case are set out in *Steinburg* v. *Fusari*, 364 F.Supp. 922, 924-927 (D. Conn.).

concerning the identical aspect of the "federal-state cooperative unemployment insurance programs" (*California Human Resources Dept.* v. *Java*, 402 U.S. 121, 125); the former arising in the context provided by the Social Security Act and the implementing laws of California, the latter in that provided by the Act and the implementing laws of Connecticut. The primary interest of Mrs. Crow, the AFL-CIO, and the Steelworkers in the instant case is, therefore, to preserve their position as litigants in the *Crow* case.

The Federation and the Steelworkers have a more general interest as well. The AFL-CIO is a federation of 111 national and international unions having a total membership of approximately 13,500,000 working men and women. The Steelworkers is an international union with a membership of approximately 1,250,000 workers. Unemployment compensation was designed to protect "workers ordinarily steadily employed." (*Java*, 402 U.S. at 131.) That, of course, is an accurate description of the great majority of trade union members. The instant case will, therefore, have a substantial impact on the manner in which unemployment compensation is administered throughout the country. That is why the AFL-CIO and the Steelworkers are vitally concerned as to its outcome (and why they intervened in *Crow*). But in this instance the practical importance of the question does not exhaust organized labor's interest in the proceeding. For, summary suspension of unemployment benefits is not based on a valid neutral principle—it is based on the principal that the entire costs of litigation delay incident to the resolution of a disputed question of continued eligibility for benefits shall be borne by the unemployed. Thus, it discriminates against workers, as a class, thereby distorting the basic protective purposes of the unemployment compensation program.

THE ISSUE TO BE COVERED IN THE BRIEF AMICI CURIAE

In their Motion to Affirm the Appellees placed their reliance on the Due Process Clause. In contrast, it is our view that this case turns on the proper interpretation of the Social Security Act, and that the cases delineating the content of due process are principally relevant insofar as they inform the construction of §§ 303(a)(1) & (a)(3) of the Act, which require the States to adopt procedures which "insure full payment" of benefits "when due," and to provide "fair hearings" to unemployment compensation recipients. The argument developed in the accompanying brief reflects this orientation.

Moreover, as already noted, the instant case does not concern Connecticut alone, it treats with the rules to be observed throughout our "federal-state cooperative unemployment insurance program," (*Java*, 402 U.S. at 125). In recognition of this, the Appellants' brief is filed on behalf of the States of Connecticut, California, New Hampshire, and Maine. The accompanying brief, in order to supplement the facts as to the Connecticut unemployment compensation program, therefore discusses in some depth the present procedures utilized in the California program (in which the *Crow* case arose).

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion to file the accompanying brief *amici curiae* in the instant case.

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Supreme Court of the United States

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No. 73-848

JACK A. FUSARI, COMMISSIONER OF LABOR, *et al.*,
Appellants,

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LARRY STEINBERG, *et al.*,
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On Appeal From The United States District Court For The District Of Connecticut

BRIEF FOR ELLENMAE CROW, THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, AS AMICI CURIAE

This brief *amici curiae* is filed by Ellenmae Crow, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the United Steelworkers of America, AFL-CIO, contingent upon the Court's granting the foregoing motion for leave to file a brief as *amici curiae.*

The interest of Mrs. Crow, the AFL-CIO, and the Steelworkers is set out on pp. i-iv of the foregoing motion for leave to file a brief as *amici curiae.*

SUMMARY OF ARGUMENT

1. *Introduction.* This case raises the question of whether a State may, consistent with §§ 303(a)(1) & (a)(3) of the

Social Security Act, or the Due Process Clause, cut off the benefits of unemployed workers who have properly been found initially eligible for unemployment compensation without an "evidentiary pre-termination hearing" (*Wheeler* v. *Montgomery*, 397 U.S. at 280, 282)—*viz.* a hearing providing the recipient a meaningful opportunity to obtain representation and gather evidence, an opportunity to appear personally, offer evidence, confront and cross-examine witnesses, and a decision by an impartial decision-maker based solely upon evidence adduced at a hearing. (See, *Goldberg* v. *Kelly*, 397 U.S. 254, 267-271.) The States' efforts to pretermit reasoned discussion of that question will not withstand scrutiny.

(a) The lynchpin of the States' position is that this Court's *per curiam* summary affirmance in *Torres* v. *New York State Department of Labor*, 405 U.S. 949, rehearing denied 410 U.S. 971, is a dispositive precedent. (Br. of Appellants, 11, 15, 22.) But, Mr. Justice Rehnquist reminded just this term that "summary affirmances * * * obviously are not of the same precedential value as would be an opinion of this court treating the question on the merits." (*Edelman* v. *Jordan*, —— U.S. ——, 42 U.S.L.W. 4419, 4425 (Mar. 25, 1974).) Moreover, to ascertain the answer to the question presented provided by the Social Security Act it is necessary to consider both §§ 303(a)(1) & (a)(3) of that Act. In *Torres*, however, the appellants never even brought § 303(a)(3) before this Court. Thus, *Torres* "lacks the precedental weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon*, —— U.S. ——, 42 U.S.L.W. 4721, 4725 n. 11 (May 15, 1974)), through which the Court has been advised of all the legally relevant issues.

(b) The States also argue that unlike the welfare recipients before the Court in *Goldberg* v. *Kelly*, 397 U.S. 254, unemployment compensation recipients who have properly been found initially eligible have no "continuing right to benefits," and thus a cessation of their benefits cannot be characterized as a "termination" or a "suspension." (Br. of Appellants, 14.) The terminology and procedures of the "federal-state cooperative unemployment insurance programs" (*California Human Resources Dept.* v. *Java*, 402 U.S. 121, 125), belie this contention.

For example, in California (the State in which *Crow et al* v. *California Human Resources Dept., et al*, No. 73-1015, arose (see Motion pp. i-iv)), after the initial eligibility determination an eligible unemployed worker is considered by the State to be in a "continued claim" status. (22 Cal. Admin. Code § 1326-4(b).) He has established a "valid claim" for benefits and consequently has been found eligible to receive a fixed benefit amount for a definite number of weeks. (Cal. Unemp. Ins. Code §§ 1276, 1280, 1281.) Thus, California recognizes that the eligible unemployed worker occupies a position entirely different from the applicant whose entitlement to benefits has never been established. Moreover, while the States argue that each week is a discrete eligibility period, a recipient's benefits can be discontinued not only for one week, but for 10 weeks, 18 weeks, or even indefinitely, depending on the purported justification for the cut-off. (See Calif. Unemp. Ins. Code §§ 1260, 1261; 22 Cal. Admin. Code § 1253(c)-2.) Finally, a point by point comparison between the welfare and unemployment compensation systems shows that both programs require the recipient to make a periodic report concerning his continued eligibility. And, just as the unemployment compensation

recipient must verify that he was "available for work," that he "conducted a search for suitable work" and that he did not refuse "suitable work," (Cal. Unemp. Ins. Code § 1253(c) & (e), 1257(b)), so, too, the AFDC welfare recipient must satisfy these same requirements (see generally 42 U.S.C. §§ 602(a)(19), 607(b)(1)(B); Cal. Welfare and Institutions Code §§ 11300, 11201).

The short of the matter is that in both the unemployment compensation and welfare systems, as a condition precedent to receiving benefits, a claimant must undergo an initial eligibility investigation and thereafter his continued payments are subject only to certain conditions subsequent.

2(a) *The Social Security Act.* The appropriate point of departure for consideration of the proper construction of the Social Security Act is the Chief Justice's succinct description of Congress' overriding goal in enacting a system of unemployment compensation:

> "[T]he Congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible * * * is what the Unemployment Insurance program was all about." (*California Human Resources Dept.* v. *Java,* 402 U.S. 121, 135.)

Only prompt and continuous payment of unemployment compensation to eligible recipients "accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demand; delaying compensation until months have elapsed defeats these purposes." (*Id.* at 133.) And only if the hearing required by § 303(a)(3) (which must include such procedural safeguards as notice, an opportunity to obtain representation, confrontation and cross-

examination of witnesses, and a decision based solely on the record at the hearing) is provided prior to a cut off is the prompt and continuous payment of benefits to those eligible to receive them assured. So long as unemployment compensation may be cut off without such a hearing, the system does not "insure full payment" of benefits "when due," as required by § 303(a)(1). For, the present administrative procedures deprive a substantial number of *eligible* recipients of their benefits during the period Congress intended them to be paid.

The national averages reflecting the performance of the "federal-state cooperative unemployment insurance programs" (*Java*, 402 U.S. at 125), over the past five years show that 28.1% of all appealed decisions terminating benefits are reversed after an evidentiary hearing, and that 47.6% of the hearing decisions are rendered more than 45 days after the cut off. In *Java*, this Court concluded that the California procedure challenged there, "which suspen[ded] payments for a median period of seven weeks" violated the Social Security Act since it "fail[ed] to meet the objective of early substitute compensation during unemployment." (*Id.* at 133.) The foregoing statistics demonstrate that the procedure challenged here is equally at odds with that prime Congressional objective.

(b) In *Goldberg* v. *Kelly* the Court noted the "particularly telling" significance of the "welfare bureaucracy's difficulties in reaching correct decisions on eligibility." (397 U.S. at 264 n. 12.) The reversal rate just cited demonstrates that the unemployment compensation bureaucracy has the same difficulty. In both instances that difficulty is the direct result of the fact that the cases being decided are those "where recipients have challenged proposed termina-

tions as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." (Cf. 397 U.S. at 268.) The issues most frequently arising in unemployment compensation cases are, in the words of the District Court in *Crow* (325 F. Supp. at 1316), "preeminently factual," and they turn on a "broad fault standard [which] is inherently subject to factual determination and adversarial input." (*Mitchell* v. *W. T. Grant*, —— U.S. ——, 42 U.S.L.W. 4671, 4677 (May 14, 1974).) Thus, the complexity of the issues and the nature of the relevant evidence make an evidentiary pre-termination hearing necessary to prevent the wrongful deprivation of unemployment compensation.

(c) Congress insisted on early substitute compensation because in its absence a worker "ordinarily steadily employed," whom the unemployed compensation program was designed to protect "would otherwise have nothing to spend." (*Java*, 402 U.S. at 131.) While the unemployment compensation system is financed under insurance principles, "the insurance technique is a means to the welfare end." (Becker, The Inadequacy Of Benefits In Unemployment Insurance, In Aid Of The Unemployed, 80 (1965).) For the typical wage earner who utilizes the unemployment compensation system, it is true today, as it was in 1935, "that there exist[s] a need which [the] individual [is] incapable of meeting [himself]." (Cf. Becker, *supra* at 81.) The average unemployment compensation recipient has sufficient assets to tide him over only three and one half weeks of uncompensated unemployment. Since the procedures for establishing initial eligibility require approximately three weeks to run their course after the loss of employment (*Java*, 402 U.S. at 126), that worker's resources

will be exhausted by the time payments begin. If his unemployment benefits are cut off, he and his family are left destitute.

It is no answer to say that such worker may secure welfare. The chief purpose of the unemployment compensation program was to:

> "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels *without the necessity of his turning to welfare or private charity.*" (*Java*, 402 U.S. at 131-132, emphasis added.)

Further, the categorical welfare programs are simply unavailable to the unemployed worker deprived of unemployment compensation. Individuals who have allegedly refused work, or are allegedly unavailable for work, the very reasons for most unemployment compensation cut offs, are automatically ineligible for categorical aid programs. (See 42 U.S.C. §§ 602(a)(19), 607(b)(1)(B).)

(d) Providing evidentiary pre-termination hearings is "administratively feasible." (Cf., *Java*, 402 U.S. at 125.)

Two preliminary points should be clarified at the outset. For those recipients who accept the state's decision to cut off benefits, nothing more than the present administrative interview is required. An evidentiary pre-termination hearing need be afforded only those who wish to contest the cut off decision. Second, this case is not like *Arnett* v. *Kennedy*, —— U.S. ——, 42 U.S.L.W. 4513 (April 16, 1974), where the requirement of an evidentiary pre-termination hearing would have repercussions on substantial nonfinancial government interests. For the States already provide

evidentiary hearings. Thus, the issue here is simply whether a recipient who challenges his cut off is to continue to receive benefits pending that hearing. The state's interest is therefore totally financial, and it is *de minimis*.

The present procedures are wholly unnecessary to safeguard the solvency of the unemployment compensation fund. In California, for example, the data available for the last full year of operations, 1973, indicate that the estimated loss resulting from payments pending a hearing would be approximately .16% of the California Fund's reserves.

The States' attempt to invoke the interests of the "private employers who fund the program" (Br. of Appellants, 24), to support their position. But this identical argument in support of cut offs without a prior hearing was raised and rejected in *Java*. (402 U.S. at 135.) As Mr. Justice Douglas explained (402 U.S. at 135 (concurring opinion).):

> "an employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is not charged with any benefits paid to his former employee pending his appeal. He has no responsibility for recoupment."

Any unrecouped overpayments resulting from the payment of benefits pending evidentiary hearings for recipients eventually found to be ineligible are charged against the overall fund. And, the employers' financial interest in that fund is identical to that of any other group of taxpayers composed of less than the general public, such as homeowners paying property taxes or automobile owners

paying automobile registration taxes. (See *Labor Board* v. *Gullet Gin Co.*, 340 U.S. 361, 364.) Further, in light of the figures indicating the minimal cost to the fund of evidentiary pre-termination hearings the possibility of any financial impact on employers as a group is unlikely in the extreme.

(c) In sum, there can be no doubt that if the Congressional purposes embodied in the Social Security Act are to be accomplished, §§ 303(a)(1) & (a)(3) can only be read as requiring evidentiary pre-termination hearings.

3. *The Due Process Clause.* The foregoing argument as to the proper construction of the Social Security Act is, we submit, despositive. But, in addition, it is well settled that in determining the content of procedural regulations such as §§ 303(a)(1) and 303(a)(3) of the Act, the courts look to the context provided by the decisions elaborating the elementary notions of fair procedure contained in the Due Process Clause, as well as to the language, purpose and legislative history of the statutes in question. (*Greene* v. *McElroy*, 360 U.S. 474, 507-508; see also, *Arnett* v. *Kennedy*, —— U.S. ——, 42 U.S.L.W. 4513, 4540 (White, J., concurring and dissenting).)

(a) From what has been demonstrated thus far it is apparent that like welfare recipients, unemployment compensation recipients who have properly been found to be initially eligible have a "legitimate claim of entitlement." The constitutional requirement of due process is therefore applicable. (See *Arnett*, 42 U.S.LW. at 4541 (White, J., concurring and dissenting), 4547 (Powell, J., concurring).)

(b) *Goldberg* v. *Kelly*, 397 U.S. 254, holds that an evidentiary pre-termination hearing is the pre-condition for

the cut off of welfare. Under the *Goldberg* analysis "the crucial factor" is whether the loss of an entitlement "may deprive" an eligible recipient "of the very means by which to live while he waits." (See *Arnett*, 42 U.SL.W. at 4541 (White, J., concurring and dissenting).) The reason for the distinction between welfare recipients and "the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption," as stated in *Goldberg*, is that for qualified recipients, "welfare provides the means to obtain essential food, clothing, housing and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239." (397 U.S. at 264.) In the cited portion of *Nash* a unanimous Court had emphasized that the improper termination of unemployment benefits would cause an unemployed worker to "risk financial ruin." (389 U.S. at 239.) Thus, in *Goldberg* the Court equated the situation of welfare, and unemployment compensation, recipients. And, the foregoing demonstrates that no line of demarcation between the two can be drawn.

The short of the matter is that unemployment compensation presents perhaps a more compelling case for evidentiary pre-termination hearings than welfare. The factual issues are more complex, and the governmental interest in summary adjudication is far less since substantial recoupment of overpayment is available. Like welfare, unemployment benefits are vitally needed, often providing the sole means of subsistence, but unlike welfare, unemployment compensation is a "contractual right" upon which Congress intended workers to be able to rely should they become involuntarily unemployed. (*Java*, 402 U.S. at 131.)

It follows that the procedural safeguards enumerated in *Goldberg* are applicable here. The opposite conclusion

would create the intolerable paradox that the unemployment compensation recipient's *earned* right to benefits would be less carefully safeguarded from arbitrary termination than the welfare recipient's right to benefits. That result would make a hollow mockery of Congress' intent to provide the worker "ordinarily steadily employed" with "security during the period following unemployment." (*Java*, 402 U.S. at 131, 132.)

ARGUMENT

1. *Introduction.* This case raises the question of whether a State may, consistent with §§ 303(a)(1) & (a)(3) of the Social Security Act, or the Due Process Clause, cut off the benefits of unemployed workers who have properly been found initially eligible for unemployment compensation without an "evidentiary pre-termination hearing," (*Wheeler* v. *Montgomery*, 397 U.S. at 280, 282)—*viz*, a hearing providing the recipient a meaningful opportunity to obtain representation and gather evidence, an opportunity to appear personally, offer evidence, confront and cross-examine witnesses, and a decision by an impartial decision-maker based solely upon evidence adduced at a hearing. (See, *Goldberg* v. *Kelly*, 397 U.S. 254, 267-271.)

In order to avoid analysis of that problem the States[1] attempt to sweep all the chessmen off the table. At the threshold they argue that the foregoing question presented is answered by prior precedent, and alternatively, that there is no such question, since in the unemployment compensa-

[1] The Brief for the Appellants is not filed solely by the State of Connecticut (in which the instant case arose), but by Connecticut, California, New Hampshire, and Maine. It is for that reason that we refer to the "States."

tion system (as contrasted to the welfare system considered in *Goldberg* v. *Kelly, supra*) no "continuing right to benefits" is established by a ruling of initial eligibility, and hence every ruling adverse to a recipient is in effect an initial determination of ineligibility, and not a "termination" or "suspension" of benefits. Neither of these efforts to pretermit reasoned discussion will withstand scrutiny.

(a) The lynchpin of the States' position is that this Court's *per curiam* summary affirmance in *Torres* v. *New York State Department of Labor*, 405 U.S. 949, rehearing denied 410 U.S. 971, is a dispositive precedent. (Br. of Appellants, 11, 15, 22.) But this Court has not accorded summary affirmances such weight.

Insofar as the instant case turns on the constitutional issue presented, Mr. Justice Rehnquist reminded just this term that "summary affirmances * * * obviously are not of the same precedential value as would be an opinion of this court treating the question on the merits." (*Edelman* v. *Jordan*, —— U.S. —— 42 U.S.L.W. 4419, 4425 (Mar. 25, 1974).) *Edelman*, itself, is a graphic illustration. There the Court "having * * * had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, disapprove[d]" the holding of three recent summary affirmances, the latest of which was *Sterret* v. *Mother and Children's Rights Organization*, 409 U.S. 809.[2] *(Id.)* This case, like *Edelman*, presents "the first opportunity [for] the Court * * * * to fully explore and treat" a substantial constitutional issue "in a written opinion." (*Id.*) The States' reliance on *stare decisis* here is therefore

[2] The two earlier decisions also disapproved in *Edelman* were *State Dept. of Health and Rehabilitation Services* v. *Zarate*, 407 U.S. 918 and *Wyman* v. *Bowens*, 397 U.S. 49.

as misplaced as was the respondent welfare recipients' reliance on that doctrine in *Edelman*.

Insofar as the instant case turns on the proper interpretation of the Social Security Act, it is equally clear that *Torres* does not foreclose plenary consideration of that question. To ascertain the meaning of the Act it is necessary to consider both §§ 303(a)(1) & (a)(3). (See pp. 18-38 *infra*.) But, in *Torres*, the appellants never even brought § 303(a)(3) before this Court.[3] Thus, *Torres* "lacks the precedential weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon*, —— U.S. ——, 42 U.S.L.W. 4721, 4725 n. 11 (May 15, 1974)), through which the Court has been advised of all the legally relevant issues.[4]

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[3] "QUESTIONS PRESENTED

"1. Does the termination of the payment of unemployment insurance benefits to a recipient, previously determined eligible to receive and receiving such benefits, without a prior evidentiary hearing, violate the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

"2. Does the termination of the payment of unemployment insurance benefits, previously determined to be due to a recipient, without the holding of a prior evidentiary hearing on the issue of the recipient's continuing eligibility for such benefits, violate 42 U.S.C. § 503(a)(1) which requires that state unemployment insurance benefit plans must be 'reasonably calculated to insure full payment . . . when due'?" (Jurisdictional Statement in No. 71-5743, 3.)

[4] Further, the Jurisdictional Statement in *Torres* blurred the issue presented in the instant case and in *Crow*. Since Torres himself had never been properly determined initially eligible (see 321 F. Supp. at 435), that case, which was presented as a single class action on behalf of *all* those deprived of unemployment com-

Our understanding that the constitutional and statutory questions implicated here are open is confirmed by the Court's actions in *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, a case in which the three-judge District Court held that the Social Security Act requires an evidentiary pre-termination hearing. (See *Hiatt* v. *Indiana Employment Security Division*, 347 F.Supp. 218 (N.D. Ind.).) If the summary affirmance in *Torres*, which was issued on February 28, 1972, had been intended by this Court to be a definitive ruling to the contrary, the disposition of the appeal in the *Burney* case, which was ruled upon on May 30, 1972, would have been summary reversal. But, instead, this Court set *Burney* down for plenary consideration. (406 U.S. 956.) Moreover, the final disposition in *Burney* was to vacate the judgment and remand the matter for consideration of "whether it had become moot." (409 U.S. at 541-542.) Possible mootness is not a jurisdictional bar to consideration of a case. It is a method of postponing decision of a live and substantial question of law pending litigation that presents that issue in a truly adversary context.

(b) The second major theme in the States' argument that unemployment compensation may be terminated or suspended without an evidentiary pre-termination hearing is that, unlike the welfare recipients before the Court in

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pensation without an evidentiary pre-termination hearing, was not focused on the procedural rights of the narrower class of recipients who have *properly* been determined initially eligible for benefits. This is a critical distinction both under the Social Security Act and the Due Process Clause. Only the latter class (which is the class before this Court in the instant case), has a claim to a pre-termination evidentiary hearing under §§ 303(a)(1) & (a)(3), and only that class has a property right which brings the due process clause into play. See pp. 18-43 infra.)

Goldberg v. *Kelly*, 397 U.S. 254, unemployment compensation recipients who have properly been found initially eligibile have no "continuing right to benefits", and thus a cessation of their benefits cannot be characterized as a "termination" or a "suspension." (Br. of Appellants, 14.) The terminology and procedures of the "federal-state cooperative unemployment insurance programs" (*California Human Resources Dept.* v. *Java*, 402 U.S. 121, 125), belie this contention.

The States' premise is that there is no continuing right to unemployment compensation benefits. But in California, for example,[5] after the initial eligibility determination (the "critical point in the California procedure")[6] an eligible unemployed worker is considered by the State to be in a "continued claim" status. (22 Cal. Admin. Code § 1326-4 (b).) He has established a "valid claim" for benefits and consequently has been found eligible to receive a fixed benefit amount for a definite number of weeks. (Cal. Unemp. Ins. Code §§ 1276, 1280, 1281.) In short, following an initial determination, the eligible unemployed worker occupies a position entirely different from the applicant whose entitlement to benefits has never been established. Thus, California draws a sharp distinction between a "new claim for benefits" and a "continued claim." (Compare 22 Cal. Admin. Code § 1326-3 with § 1326-4.) Indeed, § 1326-4(b) provides:

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[5] We discuss the California procedures because that is the State in which the *Orow* case (see Motion pp. i-iv, *supra*) arose. The Connecticut terminology and procedures with respect to "continued Claims for Unemployment Compensation" are summarized in the opinion of the court below. (364 F. Supp. at 924-926.)

[6] *Java*, 402 U.S. at 125, and see *id.* at 125-128.

> "In order to *maintain* eligibility for filing continued claims for benefits during a continuous period of unemployment, the claimant must file continued claims at intervals of not more than one week, or such other interval as the Department shall require, unless the claimant shows good cause for his delay in filing his continued claim." (Emphasis added.)

And the "continued claim" is filed by simply presenting an IBM card, entitled a "Continued Claim Statement," to a clerk at a "continued claim window."

The States' conclusion that a cessation of unemployment benefits is not a "termination" or a "suspension" (Br. of Appellants, 14), is as unsound as its premise. That conclusion is directly at odds with actual practice. Looking again to the California system, depending on the purported justification for the cut off, a recipient's benefits can be discontinued not only for one week, but for 10 weeks, 18 weeks, or even indefinitely. (See Calif. Unemp. Ins. Code §§ 1260, 1261; 22 Cal. Admin. Code § 1253(c)-2; Cal. Department of Human Resources Development Local Office Manual § 1410.)[7] For allegedly refusing an offer of work, Mrs. Crow's benefit were erroneously terminated for a "penalty period" of 10 weeks. (See *Crow* v. *California Department of Human Resources Development*, 325 F.Supp. 1314, 1320 (N.D. Cal.).) "In light of * * * [the] 'penalty', [the] impact of the finding cannot be confined to the week in which it was rendered." *(Id.)*

Thus, just as in *Goldberg* v. *Kelly, supra*, in the instant case we deal with a *termination* of government benefits. A point-by-point comparison between the welfare and unemployment compensation systems is particularly instructive.

[7] Compare Conn. Gen. Stat. § 331-236.

Both programs require the recipient to make a periodic report concerning his continued eligibility: every two weeks the unemployment compensation recipient must present a continued claim statement in the form of an IBM card; each month the AFDC welfare recipient must complete a detailed questionnaire.[8] In addition, the welfare recipient must also notify the welfare department immediately of any changes with respect to any of the factors covered in the questionnaire.[9] Just as the unemployment compensation recipient must show that he was "available for work," that he "conducted a search for suitable work" and that he did not refuse "suitable work,"[10] so, too, the AFDC welfare recipient must satisfy these same requirements.[11] He must register for work or job training,[12] and report at least every two weeks on his efforts to gain employment.[13] At all times he must be available for and actively seeking work and cannot refuse to apply for or accept a *bona fide* job.[14] In both programs, the failure to comply with reporting and job search requirements results in a cessation of benefits.[15]

The short of the matter is that in both the unemployment

[8] Cal. Welfare and Institutions Code § 11265; Cal. Department of Social Welfare, Public Social Services Manual (hereafter "PSS Manual") §§ 40-181.1-181.3, 44-103.2-103.3; Form WR7.

[9] PSS Manual §§ 40-105.1, 44-201.4; Form WR7.

[10] Cal. Unemp. Ins. Code § 1253(c) & (e), 1257(b).

[11] See generally 42 U.S.C. §§ 602(a)(19), 607(b)(1)(B); Cal. Welfare and Institutions Code §§ 11300, 11201.

[12] PSS Manual §§ 30-151, 41-407.2, 41-440.2.

[13] PSS Manual § 30-151.31.

[14] PSS Manual § 41-407.1.

[15] Compare Cal. Unemp. Ins. Code §§ 1260, 1261; 22 Cal. Admin. Code, § 1253(c)-2; Cal. Dept. Local Office Manual § 1410 with Cal. Welfare and Institutions Code § 11308; PSS Manual §§ 30-155, 41-408, 41-440.

compensation and welfare systems, as a condition precedent to receiving benefits, a claimant must undergo an initial eligibility investigation and thereafter his continued payments are subject only to certain conditions subsequent. As the *Crow* District Court found:

> "Welfare and unemployment compensation schemes both involve an initial decision re: general eligibility, followed by periodic determinations that the applicant's circumstances have not changed in such a way as to affect that first decision * * *." (325 F.Supp. at 1319. See also *Pregent* v. *New Hampshire Dept. of Employment Security*, 361 F.Supp. 782, 792 (D.N.H.) (three-judge court) vacated and remanded to consider mootness, —— U.S. ——, 42 U.S.L.W. 3651 (May 28, 1974).)

2. *The Social Security Act.* We now turn to the question presented, and to a demonstration that §§ 303(a)(1) & (a)(3) of the Social Security Act require an evidentiary pre-termination hearing.

(a). The appropriate point of departure is the Chief Justice's succinct description of Congress' overriding goal in enacting a system of unemployment compensation:

> "[T]he Congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible * * * is what the Unemployment Insurance program was all about." (*Java*, 402 U.S. at 135.)

There is no question that the "fair hearing" required by § 303(a)(3) must include such procedural safeguards as notice, an opportunity to obtain representation, confrontation and cross-examination of witnesses, and a decision

based solely on the record at the hearing.[16] And, as *Java* pointed out, § 303(a)(1), which "insures full payment of unemployment compensation when due," was designed "to provid[e] a substitute for wages lost during a period of unemployment." (*Id.* at 130.) Because unemployment compensation is a wage substitute, "to the extent that this was administratively feasible," Congress intended that benefits should be "available precisely on the nearest payday following the termination" from employment. (*Id.*):

> "The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief'. Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. Further, providing for 'security during the period following unemployment' was thought to be a means of assisting a worker to find substantially equivalent employment. * * * Finally, Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry. * * * Early payment of insurance benefits services to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services." (*Id.* at 132-133, footnotes omitted.)

Only prompt and continuous payment of unemployment compensation to eligible recipients "accomplishes the congressional purposes of avoiding resort to welfare and sta-

[16] See U.S. Dept. of Labor Unemployment Insurance Services Office of State Operations, Guide to Unemployment Insurance Benefits Appeals: Principles and Procedures, 2-3 (1970).

bilizing consumer demands; delaying compensation until months have elapsed defeats these purposes." (*Id.* at 133.) And only if the § 303(a)(3) hearing is provided prior to a cut off is the prompt and continuous payment of benefits to those eligible to receive them assured. So long as unemployment compensation may be cut off without such a hearing, the system does not "insure full payment" of benefits "when due." For, the present administrative procedures deprive a substantial number of *eligible* recipients of their benefits during the period Congress intended them to be paid.[17]

The national averages reflecting the performance of the "federal-state cooperative unemployment insurance programs" (*Java*, 402 U.S. at 125), over the past five years show that 28.1% of all appealed decisions terminating benefits are reversed after an evidentiary hearing,[18] and that

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[17] As a California legislative study pointed out:

"It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not four or five weeks thereafter." (Report of the Senate Interim Committee on Unemployment Insurance to the Fifty-Sixth California Legislature, 62 (1945).)

[18] This figure was calculated by totaling the number of appeals by claimants and totaling the number of those appeals which are successful. The latter total was divided by the former to obtain the five year composite percentage. The table below displays the results for each of the last five years:

	1969	1970	1971	1972	1973
California	32.6%	32.9%	32.7%	30.6%	32.8%
Connecticut	29.8%	29.0%	29.2%	25.6%	17.1%
Total U.S.	28.5%	28.9%	28.8%	27.8%	27.1%

Data for respective years was obtained from [March 1970] Department of Labor, Unemployment Insurance Statistics [hereinafter "U.I. Stats"], Table 18a (1969); [March 1971] U.I. Stats,

47.6% of the hearing decisions are rendered more than 45 days after the cut off.[19] In *Java*, this Court concluded that the California procedure challenged there, "which suspen[ded] payments for a median period of seven weeks" violated the Social Security Act since it "fail[ed] to meet the objective of early substitute compensation during unemployment." (402 U.S. at 133.) The foregoing statistics demonstrate that the procedure challenged here is equally at odds with that prime Congressional objective.

(b) Congress intended that evidentiary pre-termination hearings be provided unemployment compensation recipients because the potential for erroneous deprivations of benefits is great and the consequences of such errors are severe. "Rules of procedure are often shaped by the risk of making an erroneous determination. See In re Winship, 397 U.S. 358, 368 (1970) (Harlan, J. concurring)." (*Arnett* v.

Table 18a (1970); [March 1972] U.I. Stats, Table 18a (1971); [May-June 1973] U.I. Stats, Table 18a (1972); [March-April 1974] U.I. Stats, Table 18a (1973).

[19] This figure was obtained by multiplying the percentage of appeals decided after 45 days by the number of appeals for each of the last five years. These totals were summed and divided by the total of the number of appeals for the five year period which provided a composite percentage of appeals decided after 45 days. The following table displays the results for each of the last five years, the percentage listed being that of appeals remaining undecided 45 days after filing:

	1969	1970	1971	1972	1973
California	43.7%	71.2%	47.5%	35.7%	19.4%
Connecticut	26.0%	43.6%	70.6%	95.6%	84.5%
Total U.S.	44.7%	52.9%	51.6%	53.3%	35.5%

Data for respective years was obtained from [March 1970] U.I. Stats, Table 17a (1969); [March 1971] U.I. Stats, Table 17a (1970); [March 1972] U.I. Stats, Table 17a (1971); [May-June 1973] U.I. Stats, Table 17a (1972); [March-April 1974] U.I. Stats, Table 17a (1973).

Kennedy, —— U.S. ——, 42 U.S.L.W. 4513, 4541 (Apr. 16, 1974) (White J. concurring and dissenting).) In *Goldberg* v. *Kelly* the Court therefore noted the "particularly telling" significance of the "welfare bureaucracy's difficulties in reaching correct decisions on eligibility." (397 U.S. at 264 n. 12.) The reversal rate just cited (p. 20, *supra*) demonstrates that the unemployment compensation bureaucracy has the same difficulty. In both instances that difficulty is the direct result of the fact that the cases being decided are those "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." (Cf. 397 U.S. at 268.) The issues most frequently arising in unemployment cases are, in the words of the District Court in *Crow* (325 F. Supp. at 1316), "preeminently factual," and they turn on a "broad fault standard [which] is inherently subject to factual determination and adversarial input," (*Mitchell* v. *W. T. Grant*, —— U.S. ——, 42 U.S.L.W. 4671, 4677 (May 14, 1974)).

(i) Resolution of disputes as to continued eligibility for unemployment compensation normally requires determination of one or more of the following questions: Was the recipient available for work? Did he adequately investigate job prospects at a union hiring hall? Did he display the proper attitude and behavior at job interviews? Did he place improper restrictions on the types of jobs he would consider? Has he taken any action that would preclude an offer of employment? Did he comply with State reporting requirements? Did he make a willful misstatement in order to obtain benefits? Did he hold a job while drawing benefits? Was he physically able to work? Did he receive and refuse an offer for work? If so, was the work "suit-

able"? Did he receive sufficient information relative to the duties, hours of work and working conditions to enable him to make a determination as to the suitability of the work? Did a prospective job involve a risk to his health, safety or morals? Was he physically fit to perform this particular job? Did the prospective job comport with his prior training and experience? What is the nature of the job market in his customary occupation? Has the period of his unemployment been so long as to require him to accept a less skilled and lower-paying job? Is a prospective job located within a reasonable commuting distance from his home? (See Cal. Unemp. Ins. Code §§ 1253, 1257, 1258, 1259.)

Obviously, answering these questions often entails both sensitive subjective judgments as to the character and honesty of the recipient, and the evaluation and interpretation of third party information. Indeed, third party information may be dispositive. (See e.g., *Crow*, 325 F. Supp. at 1318-1320.) For example, a prospective employer is frequently the source of information regarding such issues as whether a job offer was actually made,[20] the recipient's attitude and behavior during a job interview, the conditions of the job. Outside informers of questionable veracity may, as in the case of welfare terminations,[21] supply "tips" used to disqualify unemployment compensation recipients. This occurs in cases involving a recipient's alleged failure diligently to look for work, or those where it is alleged

[20] See *Wheeler* v. *Vermont*, 335 F. Supp. 856, 858-859 (D. Vt.) (three-judge); *Crow*, 325 F.Supp at 1319 n.3.

[21] In *Kelly* v. *Wyman*, 294 F. Supp. 893, 905 (S.D.N.Y.) (three-judge court) affirmed sub. nom. *Goldberg* v. *Kelly*, *supra*, Judge Feinberg describes how plaintiff Velez was "cut off on the basis of untrue rumors and reports."

that a recipient is secretly working. State personnel other than the interviewing clerk may provide information regarding the violation of instructions they have purportedly given to the recipient. Other cases turn on objective facts which must be proved through third parties; e.g., the condition of the local job market or the availability of child care facilities. As the District Court in *Crow* stated:

> "It is in a case as Mrs. Crow's, where the claimant said she was offered no job, and where the interviewer disagreed, saying he had learned she refused employment, that confrontation and crossexamination are necessary * * *. This adverse finding, based on second hand information which was ultimately proven inaccurate * * * reverse[d] without a fair hearing, the initial determination of eligibility." (325 F. Supp. at 1319-1320.)

In sum, the complexity of the issues and the nature of the relevant evidence make an evidentiary pre-termination hearing necessary to prevent the wrongful deprivation of unemployment compensation.

(ii) The State's soothing assurances "that everything possible is done to treat all claimants as fairly as possible," (Br. for Appellants, 27), is the emptiest of rhetoric. Under the termination procedure challenged in this case, the decision whether an unemployed worker will continue to receive benefits—a decision of critical importance to him and his family—is made at an informal "interview" by an often harried clerk who each week must process the "continued claims" of scores of recipients. (See *Steinberg* v. *Fusari*, 364 F. Supp. at 924-926.)

In *Goldberg* v. *Kelly*, this Court stated that the "decision maker" must be "impartial; he should not have participated in making the determination under review." (397

U.S. at 271.) The procedure challenged here does not honor that basic admonition. The State concedes that the investigating clerk and the decision maker are one. (Br. of Appellants, 34-35.) He may have had a previous long and hostile involvement with the recipient (see Harris, *Claimant Views of Unemployment Insurance Administration in California*, 4 Unemp. Ins. Rev. 2 (1967)), or even have given the very instructions whose issuance or reasonableness are in question. Moreover, he is under no stricture to rest his decision solely on the interview; thus, he may base the ruling on his own background and knowledge or on outside information not revealed at the interview.[22]

Moreover, rather than receiving "timely and adequate notice detailing the reasons for a proposed termination" (*Goldberg* v. *Kelly*, 397 U.S. at 267-268), a recipient first learns of the proposed cut off and the reason therefore at the beginning of his interview. Not having been forewarned of the issues involved, he has been unable to gather evidence or locate and present witnesses, to familiarize himself with his substantive rights as a recipient or to secure representation. This lack of adequate prior notice completely nullifies a recipient's supposed right to present his defense "at a meaningful time and in a meaningful manner." (Cf. Br. for Appellants, 32, citing *Armstrong* v. *Manzo*, 380 U.S. 545, 552.) As the court below painted out:

> "The claimant surely cannot be expected to bring counsel and witnesses to every bi-weekly claims session, on the off chance that a 'seated interview' will result. Nor

[22] In discussing the unemployment compensation clerk's counterpart in the welfare system, the Court in *Goldberg* specifically adverted to the substantial "possibility of honest error or irritable misjudgment" in the latter's decisions. (397 U.S. at 266.)

> can the claimant be certain in advance of the subject matter of the interview. While questions involving reasonable efforts at finding work are most common, 'seated interviews' can and do involve numerous other grounds for possible disqualification." (364 F.Supp at 935 n. 25.)

Thus, a "seated interview" does not afford a recipient an opportunity to confront and cross-examine the outside sources whose information may be the basis for his disqualification. Without these historic rights a recipient has no viable means of rebutting the case against him. He is at the mercy of "individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." (*Green* v. *McElroy*, 360 U.S. 474, 497.) The "seated interview" therefore suffers from the same fatal flow as the prison disciplinary proceedings overturned in *Wolff* v. *McDonnell*, —— U.S. ——, 42 U.S.L.W. 5190 (June 26, 1974). In *Wolff* Mr. Justice White emphasized:

> "Part of the function of notice is to give the charged party a chance to marshall the facts in his defense and to clarify what the charges are, in fact. See In re Gault, 387 U.S. 1, 33-34 & n. 54 (1967). Neither of these functions was performed by the notice [which was given]. Although the charges are discussed orally with the inmate somewhat in advance of the hearing, the inmate is sometimes brought before the Adjustment Committee shortly after he is orally informed of the charges. Other times, after this initial discussion, further investigation takes place which may reshape the nature of the charges or the the evidence relied upon. In those instances, under procedures in effect at the time of trial, it would appear that the inmate first receives notice of the actual charges at the time of the hearing

before the Adjustment Committee. We hold that written notice of the charges must be given to the disciplinary action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense." (*Id.* at 5198.)

Since the present procedures can not withstand examination on the merits, the States seek to deflect attention from their flaws by arguing that the welfare procedures overturned in *Goldberg* v. *Kelly* and its companion, *Wheeler* v. *Montgomery*, were far more inadequate. (Br. for Appellants, 24, 28-29.) But even in this they are entirely mistaken. The procedures challenged here are all but identical to those overturned in *Wheeler* v. *Montgomery;* the only substantial distinction, and it is one which indicates that the *Wheeler* procedures were superior, is that California provided welfare recipients three days prior written notice. (See 397 U.S. at 281.) Moreover, *Richardson* v. *Perales*, 402 U.S. 389, a case dealing with the probative value of hearsay evidence in a social security disability hearing, heavily relied on by the States (Br. of Appellants, 20) is not at all in point. Seven separate passages of the Court's opinion in *Perales* makes it clear that, unlike the welfare termination procedure struck down in *Goldberg* v. *Kelly*, and the unemployment compensation termination procedure here at issue, the social security procedure there involved afforded the recipient ample notice and a full opportunity to subpoena, confront and cross-examine all witnesses. (402 U.S. at 397-410.)

Our insistance that the Social Security Act provides unemployment compensation recipients an evidentiary pretermination hearing is not "slavish adher[ence] to labels." (Cf. Br. for Appellants, 29.) In *Goldberg* v. *Kelly* the Court

noted that such a hearing provides "minimum procedural safeguards, adapted to the particular characteristics of [the] recipients, and to the limited nature of the controversies to be resolved." (397 U.S. at 267.) An evidentiary pre-termination hearing, as this Court has used that term, therefore does no more than is necessary to assure a fair probability that eligible recipients are not deprived of their benefits. Such a hearing does not require the *time consuming formalities* of a full trial, such as adherence to the rules of evidence, the prohibition of hearsay evidence, etc.

(c) Congress insisted on early substitute compensation because in its absence a worker "ordinarily steadily employed," whom the unemployed compensation program was designed to protect, "would otherwise have nothing to spend." (*Java,* 402 U.S. at 131.) As Mr. Justice Black stated, these workers are "of modest means," have "heavy responsibilities," and risk "financial ruin" if there is a "severance of [the] sustaining funds" provided by unemployment compensation. (*Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 239.)

While the unemployment compensation system is financed under insurance principles, "the insurance technique is a means to the welfare end." (Becker, The Inadequacy Of Benefits In Unemployment Insurance, In Aid Of The Unemployed, 80 (1965).) A detailed case by case inquiry into individual need is not required, since that has been established by class studies and since the system "operates in terms of averages." (Becker, *supra.*) But while average rather than individual need is the criterion, the *raison d'etre* of the system is to meet individual needs:

> "It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification,

the proposition contains a grave error * * *. If in 1935 we had not judged that there existed a need which individuals were incapable of meeting themselves, unemployment insurance would not have been established." (Becker, *supra* at 81.)

For the typical wage earner who utilizes the unemployment compensation system, it is true today, as it was in 1935, "that there exist[s] a need which [the] individual [is] incapable of meeting [himself]." (Cf. Becker, *supra.*) That wage earner is the sole support for a family of four.[23] His weekly earnings after the deduction of taxes are $119.23.[24] The latest government estimate is that a "lower" budget [25] for such a family is $133.94 per week.[26] Not surprisingly, more than half of these families have liquid assets of less than $500.[27] Thus, the typical unemployment compensation recipient has sufficient assets to tide him

[23] There are 53,296,000 families in the United States and 16,598,000 unrelated individuals. The average family has 3.53 members. (Statistical Abstract of the United States, 1973, p. 40, Table 51.) In 54% of families only one spouse is an income earner. (U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 90, p. 88, Table 32 (1973).)

[24] U.S. Dept. of Labor, Real Earnings in April 1974, Table 1 (May 21, 1974).

[25] The government's "lower" budget provides a bare subsistance. For example, contrary to all probabilities, it assumes that the family has a full stock of all the goods it needs. The budget allows the husband to buy a new pair of work shoes once every 20 months, a new suit once every 4 years, and a new summer suit once every 12 years. There is no allowance for payment of credit charges, although most families own items on time. As an amenity, one movie every three months is allowed.

[26] U.S. Dept. of Labor, Autumn 1973, Urban Family Budgets and Comparative Indexes for Selected Urban Areas, Table A (June 16, 1974).

[27] Mandel, Katona, et al., Surveys of Consumers 1971-1972, Table 5-7, p. 67 (1974).

over only three and one half weeks of uncompensated unemployment. Since the procedures for establishing initial eligibility require approximately three weeks to run their course after the loss of employment (*Java*, 402 U.S. at 126), that worker's resources will be exhausted by the time payments begin. If his benefits are cut off, he and his family are left distitute.

It is no answer to say that such worker may secure welfare. The chief purpose of the unemployment compensation program was to:

> "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels *without the necessity of his turning to welfare or private charity.*" (*Java*, 402 U.S. at 131-132, emphasis added)

Representative Daughton, the Chairman of the House Ways and Means Committee and the floor manager of the Social Security Act, stressed:

> "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief." (79 Cong. Rec. 5486 (1935).)

Since Congress specifically enacted the unemployment compensation program to keep unemployed workers off

welfare, the procedures the States have adopted cannot be justified by the argument that such workers, if wrongly cut off, may seek welfare.

Further, the categorical welfare programs are simply unavailable to the unemployed worker deprived of unemployment compensation. Individuals who have allegedly refused work, or are allegedly unavailable for work, the very reasons for most unemployment compensation cut offs, are automatically ineligible for categorical aid programs. (See 42 U.S.C. §§ 602(a)(19), 607(b)(1)(B).)[28]

(d) The burden of the argument thus far is that evidentiary pretermination hearings are necessary to fulfill the purposes of the Social Security Act. We now show that providing such hearings is "administratively feasible." (Cf, *Java*, 402 U.S. at 125.)

Two preliminary points should be clarified at the outset. For those recipients who accept the state's decision to cut off benefits, nothing more than the present administrative interview is required. An evidentiary pre-termination hearing need be afforded only those who wish to contest the cut off decision. And experience demonstrates that continuing benefits until the evidentiary hearing does not increase the

[28] Nor is general assistance ("county poor relief") a feasible alternative. Since that form of welfare is locally operated and financed there are many political subdivisions which do not have such a program. Where it does exist it is completely inadequate to provide even a bare subsistence level of support. The average payment is $11.00 per week. (See, President's Commission on Income Maintenance Programs, Background Papers, 279 (1969).) Consequently in *Goldberg* v. *Kelly* the possibility of local general assistance did not prevent the Court from finding that the improper termination of categorical aid could "deprive an eligible recipient of the very means by which to live." (397 U.S. at 254.)

number of recipients requesting such hearings. The District Court's order in *Burney* requiring Indiana to conduct evidentiary pre-termination hearings was in effect from October 27, 1971 until February 21, 1973, the date it was vacated by this Court. Comparing the period January-March 1971 and January-March 1972, there was an 8% decrease (from 829 requests to 764) in the number of recipients seeking a hearing.[29] Moreover, utilizing the same periods of comparison, the percentage of hearings at which the recipients prevailed increased during the period in which the District Court's order was in effect.[30]

Second, this case is not like *Arnett* v. *Kennedy*, where the requirement of an evidentiary pre-termination hearing would have repercussions on substantial nonfinancial government interests. (In *Arnett*, on the prerogative to remove employees whose conduct hinder[s] efficient operation • • • [and whose p]rolonged retention could adversely affect discipline and morale in the work place, foster[ing] disharmony and ultimately impair[ing] the efficiency of an office." 42 U.S.L.W. at 4531 (Powell, J. concurring).) For the States already provide evidentiary hearings. Thus, the issue here is simply whether a recipient who challenges his cut off is to continue to receive benefits pending that hearing. The state's interest is therefore totally financial, and it is *de minimis*.

The present procedures are wholly unnecessary to safeguard the solvency of the unemployment compensation

[29] Compare [Jan.-Mar. 1972] U.I. Stats. Table 18, p. 10 with [Jan.-Mar. 1971] U.I. Stats. Table 18, p. 14.

[30] Compare [Jan.-Mar. 1972] U.I. Stats. Table 18, p. 10 (49.2% success factor) with [Jan.-Mar. 1971] U.I. Stats. Table 18, p. 14 (45% success factor).

fund. In California, for example,[31] the data available for the last full year of operations, 1973, indicate that the estimated loss resulting from payments pending a hearing would be approximately $1,980,405 or .16% of the California Fund's $1,214,457,000 reserves.[32] In 1973, 18,861 recipients were found after a full hearing, to have been properly terminated.[33] If their benefits had been paid pending their hearing, and even if each of them had received the maximum benefit amount of $75.00[34] for four weeks,[35] the total

[31] In this instance we do not utilize national figures because, so far as we have been able to ascertain there are no published figures concerning a critical factor in the equation, the rate of recoupment. We utilize the California experience both because it is the state in which *Crow* and *Java* arose and as a result of those cases approximation of all the necessary data is possible, and because the record in the instant case is silent on recoupment.

[32] [Mar.-April 1974] U.I. Stats., Table 6(b), p. 13.

[33] [Mar.-April 1974] U.I. Stats., Table 18(b) p.30.

[34] In 1973 the maximum benefit amount was $75 (Cal. Unemp. Ins. Code 1280). It should be noted that this figure overstates the projected expense since most claimants are not eligible to receive this maximum weekly benefit amount. The California figures for the two most recent quarters illustrate this fact; in the July-September period the percentage of claimants eligible for the maximum was only 33.2% ([Jan.-Feb. 1974] U.I. Stats., Table 7), and in the last quarter, October-December, the percentage was still below half, 43.2% ([March-April 1974] U.I. Stats., Table 7).

[35] Approximately 60% of the appeals decisions are rendered within 30 days. ([March-April 1974] U.I. Stats. Table 17b, p. 28.) In *Goldberg* v. *Kelly* the Court noted that "the State is not without weapons to minimize * * * increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities." (397 U.S. at 266.) The foregoing figure confirms the Court's confidence and is a further indication (see n. 34) that the cost estimate developed above states a maximum figure. For, in 1968 the median period for a hearing decision in California was 49 days, and in 1969 it was 40.5 days (*Java*, 402 U.S. at 128, n. 6).

overpayment attributable to payments pending a hearing would have been $5,658,300. However, since California recoupes 65% of its overpayments[36] the total unrecovered amount would have been $1,980,405 of its Fund's $1,214,-457,000 reserve, or .16%.

The States' attempt to invoke the interests of the "private employers who fund the program" (Br. of Appellants, 24), to support their position. But this identical argument in support of cut offs without a prior hearing was raised and rejected in *Java*. (402 U.S. at 135.) Indeed, its resurrection surpasses understanding in light of Mr. Justice Douglas' demonstration in *Java* that it "is surprisingly disingenuous" (402 U.S. at 135 (concurring opinion)):

> "An employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is not charged with any benefits paid to his former employee pending his appeal. He has no responsibility for recoupment."

Any unrecouped overpayments resulting from the payment of benefits pending an evidentiary hearing to recipients eventually found to be ineligible are charged against the fund, for which all of the state's thousands of employers are taxed on an equal basis.[37] And the employer's financial

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[36] *See, Java*, 402 U.S. at 129, n.8. The comparable figure for 1973 is not available.

[37] "Even though the employers in the first instance pay the contribution . . . in the ultimate analysis it tends to rest upon the wage earner." (Statement of Alvin H. Hansen, Chairman of Sub-Committee on Unemployment Insurance, Committee on Economic Security, *Hearings on S. 1130 Before the Sen. Comm. on Finance*, 74th Cong. 1st Sess. 447 (1935); see also colloquy between

interest in that fund is identical to that of any other group of taxpayers composed of less than the general public, such as homeowners paying property taxes or automobile owners paying automobile registration taxes. As this Court pointed out in *Labor Board* v. *Gullett Gin Co.*, 340 U.S. 361, 364:

> "Payments of unemployment compensation were not made to the employees by respondent [his former employer] but by the state out of state funds derived from taxation. True, these taxes were paid employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state."

Moveover, in light of the figures indicating the minimal cost to the Unemployment Compensation Fund of evidentiary pre-termination hearings (pp. 33-34) the possibility of any financial impact on employers as a group is unlikely in the extreme.

The instant case is therefore wholly distinct from *Mitchell* v. *W. T. Grant Company*, 42 U.S.L.W. 4671 and *Dillard* v. *Industrial Commission of Virginia*, —— U.S. ——, 42 U.S.L.W. 4729 (May 15, 1974), both of which involved the competing claims of two private parties to the same private property.

In *Mitchell*, Mr. Justice White framed the interest involved and the question presented as follows:

> "[Mitchell's] basic proposition is that because he had possession of and a substantial interest in the seques-

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Senator (later Justice) Black and Frances Perkins, *id.* at 117-18; Note, *Charity* v. *Social Insurance In Unemployment Compensation Laws*, 73 Yale L.J. 357, 361 (1963).)

tered property, the Due process Clause of the Fourteenth Amendment necessarily forbade the seizure without prior notice and opportunity for a hearing. In the circumstances here presented, we cannot agree.

"[Mitchell] no doubt 'owned' the goods he had purchased under an installment sales contract, but his title was heavily encumbered. The seller, W. T. Grant, also had an interest in the property, for state law provided it with a vendor's lien to secure the unpaid balance of the purchase price. [Mitchell's] interest in the property, until the purchase price was paid in full, was no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default and satisfaction of outstanding claims. The interest of Grant, as seller of the property and holder of a vendor's lien, was measured by the unpaid balance of the purchase price.

"Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor * * *. The reality is that both the seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law." (42 U.S.L.W. at 4672-4673.)

Similarly, in *Dillard*, Mr. Justice Powell recognized that the Virginia Workmen's Compensation system:

"operates in a largely voluntary manner through memoranda of agreement between disabled workmen and employers or insurance companies. Compensation is paid out of private funds, in some cases through self-insurance by employers, but for the most part through coverage by private insurance companies." (42 U.S.L.W. at 4729)

In direct contrast, unemployment benefits are paid directly "by the state out of state funds derived from tax-

ation." (*Gullett Gin*, 340 U.S. at 364.) Moreover, unlike workmen's compensation, the state regulates and administers all phases of the unemployment compensation program, investigating all claims for benefits, resolving all eligibility issues without regard to any agreements between private parties, rendering termination decisions and defending such decisions as an adverse party in further administrative and judicial proceedings.

In *Mitchell* and *Dillard* the dilemma facing the Court was that a holding that one private party to the controversy had a right to a prior hearing had the inevitable result of depriving the other of his right to prior hearing. That dilemma is not present where the question is whether unemployment compensation recipients are to be afforded evidentiary pre-termination hearings. As Mr. Justice Douglas noted in *Java*, "regardless of whether unemployment compensation benefits to his former employees are suspended pending his appeal, an employer is assured of a complete opportunity to be heard *before* effective action is taken against him." (402 U.S. at 135; emphasis in original.)

(e) It is therefore apparent that if the congressional purposes embodied in the Social Security Act are to be accomplished §§ 303(a)(1) & (a)(3) can only be read as requiring evidentiary pre-termination hearings:

> "Even though [the state] on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds

that [the claimant] benefits were due and could not be summarily suspended due to a deputy's determination on ineligibility. Having been found eligible [initially the claimant] was entitled to benefits until the state afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under § 303(a)(1) of the Social Security Act. See Java, supra 91 S.Ct. at 1355." (*Hiatt* v. *Indiana Employment Security Division*, supra, 335 F. Supp. at 861. See also *Pregent* v. *New Hampshire Department of Employment Security*, 361 F. Supp. at 793-794.)

3. *The Process Clause.* The foregoing argument as to the proper construction of the Social Security Act is, we submit, despositive. But, in addition, it is well settled that in determining the content of procedural regulations such as §§ 303(a)(1) & 303(a)(3) of the Act, the courts look to the context provided by the decisions elaborating the elementary notions of fair procedure contained in the Due Process Clause, as well as to the language, purpose and legislative history of the statutes in question:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those of due process * * * These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." (*Greene* v. *McElroy*, 360 U.S. at 507-508; see also, *Annett* v. *Kennedy*, 42 U.S.L.W. at 4540 (White, J., concurring and dissenting).)

And due process analysis reinforces the conclusion, manifest in the Act itself, that the cut off of employment com-

pensation without an evidentiary pretermination hearing contravenes the requirements of §§ 303(a)(1) & (a)(3).

(a) The opinions in *Arnett* v. *Kennedy*, reveal that "six members of the Court are in agreement on [the] fundamental proposition" that:

> "to determine the existence of [a] property interest * * * one looks to the controlling * * * statutory [or common] * * * law * * *. [But] the fact that the origins of property right are with the State makes no difference for the nature of the procedures required. While the State may define what is and what is not property, once having defined those rights the Constitution defines due process." (42 U.S.L.W. at 4536 (White, J. concurring and dissenting).)

And as Mr. Justice Powell added, citing *Goldberg* v. *Kelly*, 397 U.S. at 261, 267, so long as the applicable substantive law grants an individual "a legitimate claim of entitlement" it grants him "property" within the meaning of the Due Process Clause. (42 U.S.L.W. at 4530-4531 (Powell, J. concurring).) We have already demonstrated that like welfare recipients, unemployment compensation recipients who have properly been found to be initially eligible have a "legitimate claim of entitlement." The constitutional requirement of due process is therefore applicable.

(b) *Goldberg* v. *Kelly* holds that an evidentiary pretermination hearing is the pre-condition for the cut off of welfare. (397 U.S. at 266-271.)[38] And while *Arnett* and

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[38] The States argue that because the informal interview procedure was sufficient to initially establish a claimant's entitlement to benefits it may be used to terminate those benefits once granted. (Br. of Appellants, 29-30.) This sophistic logic overlooks that the calculus of considerations in the two instances is entirely different.

Mitchell establish that an evidentiary pre-termination hearing is not required prior to every deprivation of property, those precedents do not question the *Goldberg* holding. Indeed, *Goldberg* itself distinguished the situation that eventially came before the Court in *Arnett*-discharge from public employment:

> "[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. Sniadach v. Family Finance Corp., 395 U.S. 337. For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239. Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the *discharged government employee*, the taxpayer denied a tax exemption or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." (397 U.S. at 264; emphasis added.)

Under the *Goldberg* analysis "the crucial factor" is whether the loss of an entitlement "may deprive" an

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At the initial determination the clamiant has no property interest. Once his initial eligibility is established he does. Indeed, the States' argument is as contrary to this Court's decisions as it is devoid of reason. The initial eligibility procedures utilized in welfare parallel those utilized in unemployment compensation. Yet *Goldberg* v. *Kelly* squarely hold the same procedures are not sufficient to cut off those benefits.

eligible recipient "of the very means by which to live while he waits." (See *Arnett*, 42 U.S.L.W. at 4541 (White, J. concurring and dissenting).) The reason for the foregoing distinction between welfare recipients and the "blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption", is that for qualifid recipients, "welfare provides the means to obtain essential food, clothing, housing and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239." (*Goldberg*, 397 U.S. at 264) In the cited portion of *Nash* a unanimous Court had emphasized that the improper termination of unemployment benefits would cause an unemployed worker to "risk financial ruin." (389 U.S. at 239.) In the words of Mr. Justice Black:

> "Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds." (*Id.*)

Thus, in *Goldberg* the Court equated the situation of welfare, and unemployment compensation, recipients. And the foregoing analysis demonstrates that no line of demarcation between the two can be drawn. With the exception of the means test which Congress deliberately rejected for unemployed workers, welfare and unemployment are parallel programs, each providing subsistence level support: welfare for the blind, disabled, aged and children; unemployment compensation for workers unemployed through no fault of their own. And, the typical worker "ordinarily steadily employed" (*Java*, 402 U.S. at 131), whom the unemployment compensation program is designed to protect, is in essentially the same position as his counterpart in the welfare program: First, in both instances their financial

predicament is not of their own making; second, by definition, an eligible welfare or unemployment compensation recipient wrongly cut off is unemployable; and, third, for the individuals each program covers, there is no alternative "form of support" to which the eligible recipient may turn "during the period between the pre-termination and final hearing." (*Arnett*, 42 U.S.L.W. at 4541 (White, J. concurring and dissenting).)[39] As Judge Dunway has stated, "The two programs are intertwined, both provide aid to people unable to work and there is no reason to distinguish them for purposes of this case." (*Crow*, 490 F.2d at 586 (dissenting opinion).)

The short of the matter is that unemployment terminations present perhaps a more compelling case for a prior evidentiary hearing than welfare termination. The factual issues are more complex,[40] the governmental interest in summary adjudication is far less since substantial recoupment of overpayment is available.[41] Like welfare, unemployment benefits are vitally needed, often providing the sole means of subsistence, but unlike welfare, unemployment compensation is an earned "contractual right" upon which Congress intended workers to be able to rely should they become involuntarily unemployed, (*Java*, 402 U.S. at 131).

It follows that the procedural safeguards enumerated in *Goldberg* are applicable here. The opposite conclusion

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[39] See pp. 28-31 *supra*.

[40] See pp. 22-24 *supra*.

[41] See pp. 33-35 *supra*. In contrast, Goldberg recognizes that the "benefits paid to ineligible [welfare] recipients pending decisions at the hearing probably cannot be recouped since these recipients are likely to be judgment proof." (397 U.S. at 266.)

would create the intolerable paradox that the unemployment compensation recipient's *earned* right to benefits would be less carefully safeguarded from arbitrary terminations than the welfare recipient's right to benefits. That result would make a hollow mockery of Congress' intent to provide the worker "ordinarily steadily employed" with "security during the period following unemployment." (*Java*, 402 U.S. at 131, 132.)

CONCLUSION

For the above stated reasons the instant case should be remanded to the court below with instructions to order Connecticut to provide unemployment compensation recipients, who have properly been found initially eligible for benefits, and who contest an administrative determination that they are no longer eligible, an "evidentiary pre-termination hearing," as that term is defined in *Goldberg* v. *Kelly*, 397 U.S. 254 and *Wheeler* v. *Montgomery*, 397 U.S. 280.

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